FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PRODUCTOS DE AGREGADOS DE GURABO, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2013-449-M A.C. No. 54-00316-323193 Mine: Productos de Agregados de Gurabo

DECISION AND ORDER

Appearances: Terrence Duncan, Esq., U.S. Department of Labor, Office of the Solicitor, New York City, New York, for the Secretary

Damaris Delgado-Vega, Esq., Ortiz & Ortiz, San Juan, Puerto Rico, for the Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This case is before the undersigned ALJ based upon a petition for assessment of civil penalty filed by the Secretary of Labor against Respondent, Productos de Agregados de Gurabo pursuant to 104(a) and 105(d) of the Federal Mine Safety Act of 1977, 30 U.S.C. §815(d).

Following inspection of Respondent's mine, an MSHA inspector issued Citation No. 8723601 for lack of safe access to a conveyor's greasepoint in violation of 30 C.F.R. §56.11001. The inspector alleged a miner had stated that miners accessed the greasepoint by climbing the plant's conveyor belt. At hearing, the miner denied making the assertion. This decision turns on the uncorroborated, out-of-court statement alleged by the inspector and whether such testimony can constitute substantial evidence in the face of testimonial denial of the out-of-court statement by the alleged declarant. For the following reasons, I find that the out-of-court statement lacked sufficient indicia of reliability to support the citation as written.

PROCEDURAL HISTORY

This case has a rather thorny procedural history.

On April 12, 2013, MSHA Inspector Isaac Villahermosa conducted an inspection of the Productos de Agregados de Gurabo ("P.A.G.") surface mine, wherein he issued Citation No.

8723601 under Section 104(a) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). MSHA assessed a civil penalty of $873.00 on May 29, 2013. P.A.G. timely contested the assessment on June 7, 2013 and the case was designated for simplified proceedings on July 17, 2013.

In a December 30, 2013 filing, the Respondent challenged the citation on jurisdictional grounds, alleging that, *inter alia*, P.A.G.'s business did not affect interstate commerce within the meaning of §3(b) of the Mine Act and, as a result, MSHA lacked the jurisdiction to cite Respondent's mine.[1] On March 18, 2014 the Secretary moved to discontinue simplified proceedings. The Solicitor argued the Respondent's jurisdictional arguments necessitated discovery more complex than simplified proceedings would allow. On April 9, 2014, this Court ordered simplified proceedings discontinued.

The Solicitor submitted a request to the Court for two subpoenas to depose P.A.G. staff on June 26, 2014. These subpoenas were served on July 7, 2014. The Respondent's counsel moved on August 6, 2014 for a protective order from the Secretary's subpoena requests and further moved for sanctions against the Secretary's counsel. Respondent argued that the Secretary's counsel's responses to interrogatories were deliberately obfuscatory and, as such, the Respondent was unprepared for depositions. On August 8, 2014 the Secretary's counsel responded, arguing that the motions were both untimely and they mischaracterized the Solicitor's response to discovery requests. Given Respondent's jurisdictional assertions and the parties' discovery disputes, this Court conducted a pre-hearing conference on August 8, 2014. During this conference, this Court, *inter alia*, agreed to bifurcate the proceedings so that the threshold issue of jurisdiction could be addressed initially. This Court further agreed to certify any interlocutory ruling regarding jurisdiction for review by the Federal Mine Safety and Health Review Commission (FMSHRC) as involving a controlling question of law, the immediate review of such which would materially advance the final disposition of the proceedings.

On August 11, 2014, this Court issued the following orders: ORDER BIFURCATING HEARING; ORDER TO CONFER REGARDING MATERIAL FACTS; ORDER GRANTING REQUEST FOR LIMITED DISCOVERY; ORDER DENYING REQUEST FOR PROTECTIVE ORDER; ORDER DENYING REQUEST FOR SANCTIONS. In said order(s) this Court specifically directed that the parties confer as to whether they could agree to all material facts regarding operation of P.A.G. as to the issue of jurisdiction. If no genuine issue of material fact existed, the parties were directed to file cross motions for summary decision on the question of jurisdiction. If the parties could not agree to all material facts, an initial hearing would be held limited solely to the question of jurisdiction.

As to Respondent's extensive discovery requests regarding the bases of MSHA's asserted jurisdiction over the subject mine, this Court found that the Productos de Agregados de Gurabo operation met the definition of "coal or other mine" as set forth in §3(h)(1) of the Mine Act and that the Commonwealth of Puerto Rico was clearly included as a "state" under §3(c) of the Mine

[1] Though not captioned as such, the filing was essentially a Motion to Dismiss.

Act. Discovery regarding jurisdiction was therefore limited to whether the mine was engaging in "commerce" as that term was defined in §3(b) of the Mine Act.[2]

The Respondent ultimately abandoned its jurisdictional challenge in a filing on March 12, 2015.[3]

In an effort to resolve the underlying citation without the necessity of a hearing in Puerto Rico, this Court appointed a mediator to assist the parties to reach a possible settlement. A telephonic mediation was held on March 30, 2015. Despite the parties' best efforts, a settlement could not be reached.

On April 6, 2015 the Respondent petitioned the Court to conduct a personal "ocular" inspection of the P.A.G. mine site, and on April 23, 2015 the Secretary's counsel filed a memorandum opposing the Respondent's request. On April 24, 2015, the Court denied Respondent's petition for an "ocular" inspection of the P.A.G. mine site.

A hearing was held on April 29 and 30, 2015 in Carolina, Puerto Rico. At the conclusion of the hearing the Court ordered counsel to submit post-hearing briefs. On July 6, 2015 the Secretary's counsel requested and was granted an extension to file a post-hearing brief. Similarly, on July 29, 2015, the Respondent requested and was granted an extension to file a post-hearing brief. The Secretary's counsel filed a post-hearing brief with the Court on August 5, 2015. The Respondent filed a memorandum of law petitioning the court to vacate Citation No. 8723601 on August 10, 2015. The Secretary's counsel's reply brief to the Respondent's August 10 memorandum was filed with the Court on August 13, 2015. The Respondent filed a reply to the Secretary's post-trial brief on August 17, 2015.

STIPULATIONS

At hearing the parties entered the following joint stipulations into the record:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings and over Respondent, P.A.G.

2. Isaac Villahermosa conducted an inspection of P.A.G.'s mine on April 12, 2013.

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[2] *See also* Respondent's extensive pleadings, including interrogatories, regarding the issue of jurisdiction at *Resp't's Doc.*, Dec. 30, 2013, *Sec'y's Resp. to Resp't's Interrogs., sets one and two,* Jul. 14, 2014, *Resp't's Notice of Appearance and Mot. for the Limited Purpose of Requesting a Protective Order from the Subpoena for the Dep. Scheduled for Aug. 14, 2014, and Sanctions Against Sec'y's Att'y*, Aug. 6, 2014, *et. al.*

[3] During various prehearing conferences this Court expressed its opinion that, notwithstanding various Puerto Rican statutes prohibiting the export of alluvium materials from the Rio Grande de Loiza, P.A.G.'s overall mining operations clearly involved interstate "commerce" as broadly defined in §3(b) of the Act.

3. Isaac Villahermosa issued Citation No. 8723601 at the end of his inspection of P.A.G.'s mine on April 12, 2013.

4. The citation issued by Inspector Villahermosa on April 12, 2013 was modified by Inspector Villahermosa that same day in response to an observation or comment by Mr. Calixto Frias.

5. Productos de Agregados de Gurabo timely contested the citation and its related penalty.

6. Inspector Villahermosa took the photos that accompanied Citation No. 8723601.

7. P.A.G. has never been cited for the condition alleged in Citation No. 8723601 as a violation of safe access.

8. Inspector Villahermosa, during his inspection of P.A.G.'s mine on April 12, 2013, did not witness the act of a miner climbing over the guardrails of the ladder platform to reach the conveyor, then bend over to grease the conveyor roll.

9. Respondent Productos de Agregados de Gurabo was/is the owner-operator of the Productos de Agregados de Gurabo mine.

10. Respondent P.A.G. was or is a mine within the meaning of Section 4 of the Federal Mine Safety and Health Review Act, 30 U.S.C. §804, and has/had products which entered into state commerce and/or operations or products which affected interstate commerce within the meaning of Section 4 at the time of the violation alleged in the citation.

11. Respondent P.A.G.'s mine was/is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §801, et seq. at the time of the violation alleged in the citation.

12. At the conclusion of the inspection, Inspector Villahermosa issued Citation No. 8723601. The citation alleged that Respondent violated the Mine Act regulation 30 C.F.R. §56.1100.

Tr. 124-6.

SUMMARY OF THE TESTIMONY AND RECORD

Productos de Agregados de Gurabo is a Puerto Rico-based surface mining concern, refining alluvium materials, mostly sand and gravel, from a nearby flood plain and river channel.

GX-4.[4] P.A.G. began operations on October 1, 1989, and Calixto Frias is its Chief Executive Officer. GX-6, GX-4. Located about twenty miles south of San Juan, P.A.G.'s operation is a small one, consisting of two plants, Plant No.1 and Plant No. 2, each with a loader, feeder, conveyor, and sifting apparatus overseen from one administrative office; trucks are also used on site for transporting raw and processed materials. Tr. 53-5, 207-9. In total, P.A.G. employed three miners in April of 2013. Tr. 202-3.

On the morning of April 12, 2013, Inspector Isaac Villahermosa conducted a general inspection of the P.A.G. mine.[5] Following his inspection, Villahermosa issued to Calixto Frias, C.E.O. of P.A.G., Citation No. 8723601 for lack of safe access for maintenance of the main conveyor head of Plant No. 1, in violation of 30 C.F.R. §56.11001. Tr. 40. Frias, acting in his capacity as C.E.O. of P.A.G., timely contested the citation on June 7, 2013. GX-3.

Villahermosa arrived on-site at P.A.G. at approximately 7:00 am on April 12, 2013. Tr. 97-8. Villahermosa was accompanied by Isaias Delgado, an equipment operator employed by P.A.G.[6] Tr. 24-5.

During the inspection of Plant No. 1, Inspector Villahermosa noticed what he believed to be an unsafe distance between the greasepoint of the conveyor and the elevated platform that provided access to the conveyor.[7] Tr. 27. Inspector Villahermosa testified that upon mounting the platform, he visually observed that the greasepoint was three to four feet distant horizontally

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[4] Exhibits submitted by the Secretary are designated "GX." Those exhibits submitted by the Respondent are designated "RX." These correspond to the exhibits submitted into the record prior to and during hearing. This Court's attachments are designated "CX."

[5] Isaac Villahermosa has over eight years of experience as an MSHA inspector, with roughly 250 inspections conducted as of April 29, 2015. Tr. 23. Prior to beginning work with MSHA, Villahermosa served with the United States Navy as a safety inspector and competent person for 22 years before receiving an honorable discharge. Tr. 51. Villahermosa is one of two MSHA inspectors for the entire territory of Puerto Rico, supported by one supervisor, Luis Valentín. Tr. 52, 285.

[6] Isaias Delgado has been employed by P.A.G. as an equipment operator since 2001. Tr. 321, GX-4. He completed his formal education at the 10th grade level. Tr. 248.

[7] The conveyor of Plant No. 1 is a Powerscreen Model Chieftain 5 x 10. This machine is loaded with unprocessed alluvium, either collected from a flood plain or a dredged from a river bed, and then used to filter the alluvium into fine grain and oversized materials, both of which are then deposited by the filter into separate piles. GX-4. Model Chieftains are equipped with a conveying arm that extends at least ten feet into the air diagonally; this arm uses a running conveyor belt to transport the alluvium. GX-5. The conveying arm has two bearings at its uppermost point that facilitate the rolling of the conveyor belt's pulley. GX-5. These bearings require periodic maintenance, including manual greasing, which at P.A.G. occurred roughly every two weeks during periods of regular activity. Tr. 46. This greasing is performed with a hand-operated grease gun.

from the platform's railing. Tr. 33. Inspector Villahermosa testified that he asked Mr. Delgado just how greasing was performed, given the distance from the platform to the greasepoint on the bearing. Tr. 28. According to Villahermosa's testimony, Delgado replied, "In order to get to the pulley I climb up to the conveyor." Tr. 28-9. After further questioning on just where one would mount the conveyor in order to climb up its incline, Delgado allegedly took Inspector Villahermosa down to ground level and pointed out the span of a metal support beam, running just beneath the beginning of the conveyor belt, which he used as a foothold when climbing onto the belt itself. Tr. 28-9, GX-2.

Mr. Delgado denied under oath that any conversation of this sort ever took place. Tr. 213. He testified that in order to reach the greasepoint, he had to reach outward from the platform with his arms out, but said he had no difficulties doing so from the platform. Tr. 222-3, 246. Mr. Delgado testified that while he and Inspector Villahermosa had spoken during the inspection, the first he heard of the allegation that he told Villahermosa he climbed the conveyor was after the citation was issued. [8] Tr. 206, 246-7.

While at Plant No. 1, Villahermosa took three photographs of the conveyor. The first depicted the metal support beam that Delgado allegedly identified as the beginning step for the climb up the conveyor. Tr. 29, GX-2. The second, taken from ground level, depicts the conveyor belt as it rises upward. Tr. 29, GX-2. The third depicts the bearing in question and was apparently taken from the platform itself. Tr. 29, GX-2. Inspector Villahermosa testified he took these photographs "to show the areas where the greasepoint was unreachable." Tr. 29. He made no measurements to determine how far the bearing was from the platform. Tr. 73. He did not ask Mr. Delgado to sign a document memorializing the statements the equipment operator had allegedly made to the inspector. Tr. 120. Inspector Villahermosa did not attempt to reach out from the platform to access the bearing, but visually estimated the distance between the platform and bearing.[9] Tr. 60. Inspector Villahermosa never witnessed Delgado, or any other employee of P.A.G., actually climb the conveyor itself. Tr. 101.

After photographing the conveyor, Inspector Villahermosa notified Mr. Delgado that the bearings needed to be reached with extension hoses to allow easier greasing from the conveyor platform and that this abatement needed to take place within ten minutes. Tr. 143. Once Mr. Delgado made clear his intent to comply with all instructions, including halting production at Plant No. 1 until abatement took place, Villahermosa granted P.A.G. an extension to complete abatement. Tr. 143-4.

Calixto Frias arrived on-site toward the end of Villahermosa's inspection. Tr. 38. At this time, Inspector Villahermosa issued Citation No. 8723601 to Frias personally. Tr. 39. The

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[8] At one point under questioning about his reaction to Villahermosa's description of their conversation during inspection of Plant No. 1, Delgado offered, "The thing is, I didn't go up the conveyor." Tr. 235. Mr. Delgado's somewhat confused testimony might be the result of a difficulty navigating the murky shoals of courtroom examination instead of a deliberate effort at confusing the issue.

[9] Inspector Villahermosa testified at hearing he was 5'6" in height (but appeared to be somewhat shorter to this Court). Tr. 68.

citation alleged that safe access was not provided for maintenance of the bearings on the conveyor of Plant No. 1, that miners accessed the greasepoint by climbing the conveyor belt itself, and that a fall while climbing the conveyor could lead to serious injury or death if a miner struck the concrete beneath the conveyor. GX-2, Tr. 45. The potential for an accident if a miner were to fall from the conveyor, as well as the frequency of the greasing (every two weeks during peak periods), led Inspector Villahermosa to conclude the violation was significant and substantial (S&S). GX-2, Tr.46. Upon receipt of the citation, Frias contested the issuance's language alleging the operator had been cited twice previously for the same condition but made no other argument as to the citation's validity. GX-2, Tr. 39. Villahermosa modified the citation to read "standard," rather than "condition." Tr. 39-40,152. Inspector Villahermosa told Mr. Frias that extension hoses would have to be affixed to the bearings of the conveyor of Plant No. 1 to abate the violation alleged in the citation. Tr. 167.

Frias did not take Villahermosa to Plant No. 1 to dispute the citation in detail or point out existing safe access areas. Tr. 41. Frias testified that he received the citation, informed Inspector Villahermosa of his intent to challenge the citation's validity, but did not have time to fully process the entire text of the citation itself. Tr. 322. Mr. Frias testified that it was only after Inspector Villahermosa had left the office that he had time to "analyze and understand what the allegation was," by which point Villahermosa was no longer available to discuss the citation. Tr. 322-3. Mr. Frias expressed fear of retaliation as a further reason for his failure to contend with Inspector Villahermosa on the morning of April 12. Tr. 202.

Following the receipt of the citation Frias went out later the same day and purchased extension hoses and had the hoses installed on the bearings of the conveyor of Plant No. 1. Tr. 157-8. At hearing, Frias testified that the hoses purchased to abate the violation were threaded into the greasepoints of the conveyor by standing on the same platform Villahermosa cited for unsafe access. Tr.188-9. Frias did not disclose any difficulties that his employees had in greasing the head pulley with grease guns alone.[10] Tr. 188-9.

Sometime after April 12 Mr. Frias and Mr. Delgado spoke about the citation. Mr. Frias testified that he waited at least a day before approaching Mr. Delgado to discuss just what happened that led to the citation. Tr. 170. In testimony Frias remarked upon Inspector Villahermosa's "perturbing" effects on his staff during and after inspections and said that "I didn't want Isaias [Delgado] to feel at that time that I was questioning him or blaming him or saying anything that might perturb him." Tr. 204. For his part, Mr. Delgado asserted that he was told about the violation the next day, April 13, 2013, and that the conversation touched only upon the installation of the greasehoses. Tr. 218-9.

Within two weeks, Inspector Villahermosa returned and noted the proper installation of the extension hoses. He concluded the violation had been abated. Tr. 41-2.

Approximately one year after the events of April 12, 2013, Inspector Villahermosa issued another, unrelated citation to P.A.G., prompting Mr. Frias to call on the local MSHA field office. Tr. 196. There Mr. Frias spoke to Luis Valentín, Inspector Villahermosa's supervisor. Tr. 196,

[10] There was some question during testimony as to whether Mr. Delgado and Mr. Diaz, another employee of P.A.G., installed the greasehoses, or if Mr. Diaz alone installed the hoses.

285-6. Mr. Frias complained of Villahermosa's most recent citation and Citation No. 8723601, believing they were "becoming a pattern of irregularities." Tr. 196. At hearing Mr. Valentín testified that Inspector Villahermosa had something of a reputation for his problematic "delivery" of citations and that his style of inspection had garnered comment from operators before, but Valentín had never personally seen Villahermosa behave improperly while on the job. Tr. 299, 307.

At hearing, Inspector Villahermosa was presented with photographs taken by the Respondent that appeared to depict safe access to the backside of the conveyor from the platform. Tr. 340, RX 1-8. Inspector Villahermosa was uncertain as to whether the photographs accurately depicted Plant No. 1's setup when he issued Citation No. 8723601. Tr. 340-1.

At hearing, Inspector Villahermosa described how his third photograph, depicting the bearing of the conveyor, was taken. GX-2. At first he asserted it was taken while in front of the conveyor as if the platform lacked access to the backside.[11] Tr. 77-8. Later Villahermosa stated that the platform in question did "come out some," and he was standing in that space when he took his third photograph. Tr. 82-3.

At hearing, the Secretary introduced into evidence enhanced copies of Inspector Villahermosa's original notebook entries concerning the inspection. Tr. 139. Inspector Villahermosa testified that the duplicates accurately reflected the notes he took during the inspection on April 12, 2013. Tr. 145-6. One page of the notebook possessed certain irregularities that led the Respondent to question the authenticity of the exhibit. Tr. 145-6. The Court, after experiencing difficulty aligning the enhanced version with the unenhanced version already in the record, requested Inspector Villahermosa's original notebook for examination. Tr. 141, 148.[12] Ultimately, the Secretary supported his case by Villahermosa's testimony alone and without the benefit of the inspector's field notes. CX-3.

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[11] At no point in the record does Inspector Villahermosa assert directly that the platform had no access to the backside, but his language throughout his testimony is suggestive of this. Tr. 56, 69, 80. That Villerhermosa implied there was a lack of access to the backside of the conveyor is confirmed by his own statement that "*I said it didn't go down the side*. I didn't say it didn't come out some." Tr. 83, emphasis added. This relatively minor detail assumes greater importance when one considers that the citation at issue alleged unsafe access to the greasepoint. Villahermosa later testified that he could not be sure if safe access to the backside did exist. Tr. 83. Villahermosa testified further that if he had seen safe access to the backside, he would have instead cited Respondent for improper guarding. Tr. 342. Villahermosa's testimony suggests the inspector himself was unsure at hearing if safe access existed, but chose to rely on Delgado's alleged out-of-court statement to support his citation.

[12] As discussed *infra*, the Solicitor agreed to have the original notebook, located in an MSHA district office in Birmingham, Alabama, mailed to the Court within approximately twenty days. Tr. 148. Twenty one days later, the Solicitor authored a letter to the Court averring that UPS records showed the notebook, sent by overnight mail, had been delivered to the New York Solicitor's Office. Somehow the package, and the original notebook with it, had disappeared

CONTENTIONS OF THE PARTIES

The Respondent contends that the Secretary has failed to meet its burden of proof, asserting that the citation's factual basis has not been proven by a preponderance of the evidence. P.A.G. further contends that Isaias Delgado's alleged remark is an uncorroborated hearsay statement that cannot alone sustain the violation. P.A.G. also contends that insufficient notice was provided by the citation itself because it did not include Delgado's alleged statement. Additionally, P.A.G. argues that the Secretary's additional corroborative evidence is not, in fact, corroborative. P.A.G. argues, in the alternative, that if the citation is found valid, it does not satisfy the *Mathies* standard as a significant and substantial violation.

The Secretary contends that a preponderance of the evidence establishes that P.A.G. failed to provide and maintain a safe access for the conveyor of Plant No. 1 and that the violation should be affirmed as S&S and one of high negligence. He argues that Isaias Delgado told MSHA Inspector Isaac Villahermosa that routine maintenance was performed by climbing the conveyor belt of Plant No. 1. The Secretary also contends that Isaias Delgado and Calixto Frias's testimony is not credible. He further argues that, even if the Court chooses to disregard Mr. Delgado's alleged statement to MSHA Inspector Villahermosa, there is sufficient additional corroborative evidence to support the citation as issued. He maintains that the citation itself provided adequate notice of the alleged violation to P.A.G.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 12, 2013, MSHA Inspector Isaac Villahermosa issued Citation No. 8723601 to Respondent. The inspector alleged that:

> A safe access was not provided for maintenance of the main conveyor head pulley in plant # 1. Miners access area by climbing on the conveyor belt when required for maintenance. Miners can sustain serious or fatal injuries if they fell from approximately 5 to 10 feet to the floor. The mine operator had been cited 2 times previously for this condition.[13]

GX-2 §8.

30 C.F.R. §56.11001, "Safe access," provides that:

Safe means of access shall be provided and maintained to all working places.

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after delivery -- certainly, in the Solicitor's words, "the unlikeliest of occurrences." Letter from Terence Duncan, Senior Trial Attorney, Secretary of Labor, to the undersigned (May 20, 2015) see CX-3.

[13] The citation was later modified to read "standard" in place of "condition" at Calixto Frias's objection. See *supra*.

Burden of Proof and Standard of Proof

The Secretary must prove the basis of a violation by a preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006), *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: "[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates." *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877).[14]

While the Secretary must prove the elements of a citation by a preponderance of the evidence, this Court's factual determinations must be supported by substantial evidence.[15] The

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[14] "What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case." 2 McCormick On Evid. § 339 (7th ed.), emphasis mine. Indeed the notion of justice being an assessment by weighing has ancient roots, extending at least as far back as the *Iliad*'s Book XXII: "Then, at last, as they were nearing the fountains for the fourth time, the father of all balanced his golden scales and placed a doom in each of them, one for Achilles and the other for Hektor." HOMER, THE ILIAD, BOOK XXII, trans. Samuel Butler, 1898.

[15] When reviewing the finding of fact by a lower court, the Commission will decline to disturb the determination if is supported by substantial evidence. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1687 (Dec. 2010), *U.S. Steel Mining Co.*, 8 FMSHRC 314, 319 (Mar. 1986). This test of factual sufficiency has been a part of Commission jurisprudence since its inception, required by the plain text of the Mine Act itself. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Substantial evidence has been described by the Commission as "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion."

Commission has recognized out-of-court statements may constitute substantial evidence. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135-37 (May 1984).

The Hearsay Evidence Presented By the Secretary was Not Sufficiently Probative or Trustworthy so as to Support a Finding of a §56.11001 Violation

It is undisputed that Inspector Villahermosa did not personally witness any miner or miners improperly climbing upon the conveyor to gain access to the main conveyor belt assembly and/or being unable to safely access the greasepoint at issue. Tr. 101. Rather, in issuing his citation, Villahermosa primarily relied upon the alleged hearsay statements of P.A.G. miner, Isaias Delgado. Tr. 28-9. Thus, this Court is confronted with the critical question as to whether the Secretary has been able to carry his burden of proof by relying upon the alleged out-of-court statements of Isaias Delgado.

The alleged oral statements of Delgado appear to meet the classic definition of hearsay: an out-of-court declaration that a party offers to prove the truth of the matter asserted. FED. R. EVID. 801(c).

Although Commission procedural rules explicitly allow for the admission of hearsay evidence, this Court does harbor reservations regarding the use of such to serve as the primary basis to support a finding of a mandatory safety standard violation. Nonetheless, as noted *supra*, the Commission has held properly admitted hearsay evidence, deemed to be sufficiently relevant and material in nature, and the reasonable inferences drawn from such, may constitute substantial evidence so as to uphold an ALJ's finding of violation. *See Mid-Continent Res., Inc.*, 6 FMSHRC 1132. *See also Sec. of Labor v. R.E.B.*, 20 FMSHRC 203, 206 (Mar. 1998) (regarding the Court's obligation to determine whether hearsay evidence is reliable and entitled to any probative weight.)

This Court has carefully considered the Commission's directives in *Mid-Continent* in evaluating the hearsay evidence presented by the Secretary in the case *sub judice* and is constrained to find that such evidence was not "surrounded by adequate indicia of probativeness and trustworthiness" so as to be able to sufficiently support a finding of violation. *See Mid-Continent*, at 1136.

The Commission in *Mid-Continent* rejected a *per se* rule that evidence may not be considered to be substantial for purposes of review merely because it bears a hearsay label. Rather, the Commission held that the underlying probative value of the hearsay evidence had to be carefully evaluated against various case specific factors:

> Although no single test can be established to evaluate the role of hearsay in determining whether substantial evidence supports a judge's finding, we measure the probative value of such evidence by weighing it against various factors, which, when added together, may tip the scale for or against a determination that substantial evidence is present. For example, we look to whether the out-of-court declarant, whose statement is reported at

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Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

the hearing by another, had an interest in the outcome of the case and thus a reason to dissemble. *Richardson v. Perales*, 402 U.S. at 402–03. We also examine whether the out-of-court statement rests on personal knowledge gained from firsthand experience. 402 U.S. at 403. If there is more than one reported statement, we inquire whether the statements are consistent. 402 U.S. at 404. We also find significant whether the party against whom the statement was used exercised the right of subpoena so as to cross-examine the out-of-court declarant. 402 U.S. at 404. We likewise determine whether the making of the statement was denied or whether its contents were declared untrue. And we examine the content of any contradictory or corroborating evidence. *School Board of Broward County, Florida v. H.E.W.*, 525 F.2d 900, 907 (5th Cir.1976). Our aim is to determine if, given all of these factors, there is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Mid-Continent Res., Inc., 6 FMSHRC 1132, 1136-37, 1984.

In *Mid-Continent*, the ALJ permitted testimony regarding out-of-court declarations made by a mine foreman to two MSHA Inspectors concerning the improper installation by an unqualified individual of a cover plate which was part of a causative chain leading to an explosion and the Court primarily relied upon such hearsay evidence in concluding that there had been a violation of a mandatory safety standard. No contrary evidence was presented by the mine operator.

The hearsay evidence presented *sub judice* was far more problematic.

The out-of-court declarant in *Mid-Continent* was a foreman, presumed to know what he and his miners were doing. *See Mid-Continent*, at 1137. As discussed *intra* Delgado was a rank and file miner with a limited education and no supervisory role.

In *Mid-Continent* the out of court declarant had *not* been subpoenaed by the operator to rebut at hearing what he was reported to have said by the inspectors. *Mid-Continent*, at 1137. As discussed *infra*, Delgado appeared and testified on behalf of the Respondent, not endorsing Villahermosa's version of their conversation.

In *Mid-Continent*, there were two inspectors who gave consistent testimonial accounts as to what the out-of-court declarant purportedly said. Here, Villahermosa had no such fellow corroborating inspector nor any other witness supporting what he had allegedly heard Delgado say.

In *Mid-Continent*, the Respondent essentially did not defend against the Secretary's evidence that an unqualified person had installed the coverplate. In the case *sub judice* the operator mounted a vigorous defense of the citation that there was unsafe access, offering both testimony and photographic evidence that miners could safely access the conveyor pulley by means of guarded stair-wells and safely grease the pulley by standing on an adjoining platform. Tr. 182-5, 188-9.

In *Mid-Continent*, the fact that an explosion had taken place not only raised an inference of a possible safety violation but, given that the explosion was fatal in nature, understandably raised questions regarding the Respondent's witnesses' willingness to be altogether forthcoming. *See Mid-Continent* at 1138. There were no such compelling circumstances impacting upon Respondent's witnesses' willingness to tell the truth.

Delgado's Out of Court Statements

In his brief, the Secretary suggests that Delgado's statements were not hearsay but were admissible non-hearsay pursuant to sections 801(d)(2)(A) and (D) of the Federal Rules of Evidence.[16] Given the above cited Commission case law allowing for the admission of hearsay evidence, such evidentiary distinction may be of little import. However, this Court observes that the commentary to Rule 801 states that "the hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth." *See* subdivision D, FED. R. EVID. 801(d)(2).

This is, of course, precisely what took place at hearing. Delgado denied ever having made the incriminating statements or denied the veracity of such. Tr. 102-3. Thus, the question of whether Delgado had in fact admitted to Villahermosa that he had accessed the head pulley by climbing onto and walking on the main conveyor belt becomes a critical factual issue for this Court to decide.

At hearing, Villahermosa, under questioning by this Court, acknowledged that he had not secured an affidavit from Delgado attesting to such unsafe access nor did he have Delgado sign or initial any written statement confirming such. Tr. 120. This Court notes that such written evidence would have substantially supported Villahermosa's version of events and the lack of such evidence further weakened the Secretary's case.

Moreover, Villahermosa also contended that he had memorialized Delgado's admissions in his general field notes. GX-2, at 8. At hearing the Secretary proffered an "enhanced photocopy" of page 3 of Villahermosa's field notes wherein it was indicated that Delgado had reportedly "stated that he climbed up the main conveyor to reach the head pulley for maint[enance]." Tr. 140. Respondent's counsel objected to the admission of the enhanced field note because the photocopy of Exhibit P-2 supplied to her in discovery did not legibly reveal this alleged statement. This Court attempted to align both the enhanced photocopy presented at hearing and the unenhanced photocopy supplied to Respondent in discovery without success. *See* CX-1 and CX-2, which are photocopies, enhanced and non.[17] Tr. 140-8. To ensure that the enhanced photocopy was an accurate depiction of the inspector's original field notes, and, was in no way the result of tampering or alteration, this Court requested that the Secretary secure the

[16] In *Mid-Continent*, the Commission drew no distinctions in its analysis of "trustworthiness" of the out-of-court declaration between hearsay and a non-hearsay exception.

[17] Court attachments 1, 2, and 3 are, respectively: Villahermosa's field notes as given to Respondent in discovery, the Secretary's enhanced photocopy of Villahermosa's field notes, and a letter from the Secretary described in detail *infra*. These attachments are part of the record.

original field note from MSHA. Tr. 148. Subsequent to the hearing, however, Secretary's counsel advised this Court that an exhaustive search had failed to uncover the original field note which possibly had been mislaid or discarded in error. CX-3. Accordingly, the Secretary would only be referring to the inspector's testimony regarding his conversation with Delgado. CX-3.

That such a critical piece of corroborative evidence went missing is troubling. However, this Court declines to speculate whether this absent evidence was due to incompetence, mischief, or just plain bad luck. Whatever the reason, the lack of a corroborative original field note further damaged the Secretary's case.

At hearing, Delgado took abnormal lengths of time to respond to questions. He had limited formal schooling, and appeared susceptible to suggestion or intimidation. His answers were halting and simple, suggesting he had some difficulty understanding much of the proceedings.[18] Despite the lengthy direct and cross-examinations of Delgado, this Court remains uncertain as to what this witness actually said or meant to say on the date in question. Considering Villahermosa's failure to memorialize Delgado's statements via written attestation, the disappearance of Villahermosa's original field notes, Delgado's repudiation of the alleged statements, Villahermosa's lack of observation of any cited unsafe activity -- this Court declines to give much probative weight to Delgado's alleged out-of-court statement.[19]

Moreover, the Secretary's reliance upon such evidence raises, in this Court's mind, troubling questions regarding the Respondent's rights to due process.

There is a vast and growing body of law dealing with rights of the criminally accused vis-a-vis alleged confessions and admissions. Such criminal jurisprudence may not be directly applicable to cases arising out of the Mine Act. However, many of the constitutional, due process, and evidentiary considerations articulated in such jurisprudence would appear relevant to the present controversy. For over a century, federal courts have recognized that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Recent history has seen a growing body of due process jurisprudence, born out of the recognition that the power of the state- in all its forms, civil or criminal- must be balanced against the individual's right to defend against deprivation. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970), *Wheeler v. Montgomery*, 397 U.S. 280 (1970), *Ortwein v. Schwab*, 410 U.S. 656 (1973), *Mathews v. Eldridge*, 424 U.S. 319 (1976), *et. al.* Since *Goldberg*, federal

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[18] Regardless of Delgado's limitations, answering some of the questions offered at hearing by Respondent's counsel would have proved challenging even for an experienced litigant. See, for example, the exchange at Tr. 240-1.

[19] For a comparable case, consider *Hoska v. U.S. Dep't of the Army*, 677 F. 2d 131, D.C. Cir., 1981. In *Hoska* a civilian employee of the Department of the Army was terminated when accused of on-the-job improprieties. The Department of the Army supported its decision by relying "almost entirely on unsubstantiated hearsay evidence." *Hoska*, at 282. Conversely, Hoska, the terminated employee, bitterly maintained his innocence of all charges. The D.C. Circuit found Hoska's resistance, along with the failure of the Department of the Army to produce any substantial evidence beyond out-of-court statements, persuasive, and decided in Hoska's favor. *Hoska*, at 292-4.

courts have viewed due process considerations as not solely the province of the criminal sphere, reasoning that deprivations of property also triggered such protections in the civil context. These considerations have their roots in the jurisprudence of criminal law.

For example, the "corpus delicti" (Latin for "body of the crime") is an evidentiary rule that requires the prosecution, in a criminal case, to produce evidence that a crime has been *actually* committed *before* the statements of the accused can be admitted as evidence of guilt. This rule is traced back to the infamous *Perry's Case* in England. 14 How. St. Tr. 1311 (1660). A John Perry had reportedly implicated himself, his brother, and his mother in the murder of an individual who had mysteriously disappeared, leaving behind only a "hacked and bloody hat." Sometime after the three family members were hanged, the purported victim turned up, alive and well, claiming he had been kidnapped by Turkish pirates and enslaved before eventually escaping. This case is better known in the United Kingdom as "the Campden Wonder."

In response to this and other similar miscarriages of justice, both English and American courts developed the *corpus delicti* rule to guard against "the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed." *Com. v. Turza*, 340 Pa. 128, 134 (1940). *See also In re Flodstrom* 134 Cal. App. 2d 871 (1954).

While many courts have now abandoned strict application of the *corpus delicti* rule in favor of a "trustworthiness" approach, courts still require that the government must introduce substantial evidence which would tend to establish the trustworthiness of the defendant's statement. *Opper v. United States*, 348 U.S. 84 (1954).

The *corpus delicti* rule is reflected in the above cited Commission case law that likewise directs this Court to employ a "trustworthiness" test in evaluating the Secretary's offered hearsay evidence as to Delgado's alleged incriminatory statements.

Given the total circumstances, this Court can only speculate as to whether Delgado had actually made the inculpatory statements or not.[20] Such hearsay evidence is too thin of ice upon which to base a finding of a violation.

Disregarding Delgado's Out-of-Court Declarations, There Was Insufficient Evidence Presented to Uphold the Citation

In his brief, the Secretary argues that a reasonable operator in Frias's position would have immediately disputed the validity of the violation with Villahermosa at the time of the citation's issuance and that Frias's failure to do so would constitute additional evidence to uphold the citation. Sec'y's Br., at 5-6, 8. The Secretary essentially advanced a similar argument as to Frias's continued silence about the accuracy of the allegations in the citation at issue when he met with Villahermosa's supervisor, Luis Valentín, months later to discuss an unrelated citation.

[20] "Where there is room for question, something is wrong." – Jewish folk saying. JOSEPH L. BARON, A TREASURY OF JEWISH QUOTATIONS.

In asserting such, the Secretary is advancing the old "silence is affirmation" argument.[21] Of course, if this mine operator stood accused of criminal wrongdoing, such an argument would fly in the face of a vast body of law protecting an individual's Fifth Amendment rights against self-incrimination, including the right to remain silent. The Secretary cited no statutory or Commission case law for the proposition that under the Mine Act a miner operator's silence at the time of citation issuance or thereafter should be considered to be evidence of violation or create an adverse inference regarding such.

At hearing, the Respondent essentially argued that it would have been an adventure in futility to have attempted to dissuade Villahermosa. Tr. 167. This Court has repeatedly heard similar explanations from various mine operators for their silence in other cases: they did not actively dispute the issuance of citations at the scene because either they already knew the futility of such or they feared that any argument would merely inflame the inspector. While there might be a set of particular case circumstances where silence could arguably suggest affirmation of violation, this Court does not believe such exists here.[22]

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[21] See the Latin proverb, "Qui tacet consentire videtur,": he who is silent is considered to agree.

[22] In Robert Bolt's classic 1966 film "A Man for All Seasons," Cromwell's exchanges with Sir Thomas More illustrate the problematic nature of construing silence as consent:
Cromwell: Now, Sir Thomas, you stand on your silence.

Sir Thomas More: I do.

Cromwell: But, gentlemen of the jury, there are many kinds of silence. Consider first the silence of a man who is dead. Let us suppose we go into the room where he is laid out, and we listen: what do we hear? Silence. What does it betoken, this silence? Nothing; this is silence pure and simple. But let us take another case. Suppose I were to take a dagger from my sleeve and make to kill the prisoner with it; and my lordships there, instead of crying out for me to stop, maintained their silence. That would betoken! It would betoken a willingness that I should do it, and under the law, they will be guilty with me. So silence can, according to the circumstances, speak! Let us consider now the circumstances of the prisoner's silence. The oath was put to loyal subjects up and down the country, and they all declared His Grace's title to be just and good. But when it came to the prisoner, he refused! He calls this silence. Yet is there a man in this court - is there a man in this country! - who does not know Sir Thomas More's opinion of this title?

Crowd in court gallery: No!

Cromwell: Yet how can this be? Because this silence betokened, nay, this silence was, not silence at all, but most eloquent denial!

Sir Thomas More: Not so. Not so, Master Secretary. The maxim is "Qui tacet consentire": the maxim of the law is "Silence gives consent". If therefore you wish to construe what my silence betokened, you must construe that I consented, not that I denied.

Cromwell: Is that in fact what the world construes from it? Do you pretend that is what you wish the world to construe from it?

Sir Thomas More: The world must construe according to its wits; this court must construe according to the law.

A MAN FOR ALL SEASONS (Columbia Pictures 1966).

In his brief the Secretary further suggests that Respondent's abatement of the violation on the same date it was cited constituted corroborative evidence to uphold the violation. Sec'y's Post Trial Reply Br., at 6.

It is clear that an operator's demonstrated good faith in attempting to achieve rapid compliance after notification of violation should be considered in determining the penalty amount to be assessed. See, *inter alia*, §100.3(a)(1)(V). This Court, however, does not find that Respondent's speedy cooperation in abating the cited unsafe access condition(s) to be further evidence that a violation, in fact, existed. Some acts of abatement- dependent upon the particular circumstances of a case- may well be indicative of the existence of a violation. But not *every* act of abatement necessarily constitutes evidence of a violation.

Frias essentially testified at hearing that the purchase and installment of the greaser-extensions was a relatively minor affair that could be performed rapidly and inexpensively. Tr. 157. Rather than risk further citations and/or orders by further debating the matter with an obviously adamant Villahermosa, Frias chose the prudent course of quickly installing extensions, even if they were unneeded, to mollify the inspector.[23] Tr. 157. At hearing, Frias credibly testified that miners standing on the platform- as depicted in RX-4- were able to safely grease the head pulley without the necessity of an extension. RX-4.

This Court found Frias to be quite sincere and credible in his explanations at hearing and therefore finds that the abatement in this case's context did not constitute proof of violation, either inferentially or directly.

The Photographic Evidence Presented Appears to Support Either Party's Position

Much of this controversy has turned on the arrangement of the conveyor's walkway and placement of platform at the time of the citation. Photographs have been moved into evidence by both parties, who each allege their photographs support their theory of the case. Given the testimonial contradictions existent in the case, some description of the photographs is necessary. The Respondent's six photographs appear to depict safe access to the conveyor's greasepoint. RX-1-6. Three photographs depict P.A.G. employees engaged in greasing maintenance with apparent safe access. RX-3-4, 6. Two depict P.A.G. employees mounting the platform in order to access the greasepoint. RX-1-2. Finally, one photograph depicts a tape measurer, appearing to show the greasepoint's height, measured at 5 feet. The Respondent maintained at hearing that these photographs accurately depicted the conveyor/platform on April 12, 2013 when the Secretary issued its unsafe access citation. Tr. 182-5.

The Secretary's photographic evidence is described in detail *supra* in the Summary of Facts and Testimony. The photographs taken by Villahermosa are cropped or framed in such a way as to make determination of the violation by examination of such – even in their enlarged formats – extremely problematic. The first photograph shows only the bottom of the conveyor itself, setting aside Villahermosa's stated reasons for taking said photograph. GX-2, at 13. The

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[23] This Court has heard similar rationales advanced by operators in describing their abatement efforts in numerous cases, some of which were credible and some not.

second photograph merely shows the incline of the conveyor from below, rendering the viewer unable to discern a safe access or, for that matter, an unsafe access. GX-2, at 13. Finally, the third photograph shows the greasepoint itself, at close range, with no view of the arrangement of the platform or the platform's actual distance from the conveyor's greasepoint. GX-2, at 13.

MSHA inspectors are not expected to possess a professional's proficiency in photography, nor should citations fail solely because of inartful photographic framing. However, in none of Villahermosa's photographs can the Court discern evidence of a safe access violation. The pictures fail to show the position of the platform, and whether that platform extended out and around the conveyor to permit safe access to the backside greasepoint on the pulley head. The pictures also fail to depict any P.A.G. employee climbing up the conveyor belt. Even accepting that all three photographs accurately depict the conveyor on the date of the citation, they do not fully support the Secretary's assertion that there was unsafe access.

The photographic evidence arguably supports either party's position. At hearing, Villahermosa himself was unable to say with certainty whether the Respondent's photographs accurately depicted the conveyor as it stood on the date of citation. Tr. 340-1. This Court has compared all photographic evidence and concludes that Villahermosa's photographs and the Respondent's photographs could, together, depict the conveyor accurately. Because Villahermosa's photographs are so framed in their depiction of the conveyor's setup, they appear to differ from the Respondent's in only one pertinent respect: the Respondents' photographs depict the greasehoses installed by way of abatement. In all other respects the two sets of photographs can be reconciled together. Therefore the Secretary's photographs, as proffered, may or may not depict unsafe access and as such this Court finds they do not constitute persuasive evidence to support an unsafe access violation.

The Secretary's Alleged Corroborative Evidence Is Not Supportive of a Finding of Violation

As discussed *supra* Villahermosa did not actually witness any miner placing himself at risk in attempting to grease the pulley. In his Post-Trial Brief, the Secretary argues that the citation is supported by additional corroborative evidence. The Secretary contends this evidence can support the citation even without admitting Isaias Delgado's out-of-court statement. Sec'y's Post-Trial Br., at 9-11.

The Court finds that none of the Secretary's cited corroborative evidence, singly or *in toto*, constitutes persuasive evidence of violation. This Court will address the Secretary's arguments regarding such *seriatim*.

The Secretary's first piece of corroborative evidence is essentially a summary of Villahermosa's own testimony: Villahermosa opined that the walkway did not provide a continuous, safe access to the greasepoint. Sec'y's Post-Trial Br., at 9. This contention was, as noted *supra*, contradicted by Frias who ridiculed the idea that someone would climb upon the beltway and need to bend over in an awkward position to grease the pulley and who further testified that his miners were able to easily access the greasepoint from a standing position on the adjoining platform. Tr. 190, 182.

The second is another hearing assertion of Villahermosa's. Sec'y's Post-Trial Br., at 9. Inspector Villahermosa estimated the distance between the greasepoint and the walkway's terminus was roughly three to four feet. Sec'y's Post-Trial Br., at 9. However, he took no actual measurement of the distance between where a miner would be standing up against the rail and reaching with a greasegun toward the greasepoint. Tr. 60. Frias, as noted *supra*, testified that miners were able to safely grease the pulley with grease guns without need of an extension. Tr. 182.

The third, fourth, and fifth pieces of corroborative evidence are again assertions of Villahermosa's. Sec'y's Post-Trial Br., at 10. All three concern the alleged statements made and actions taken of Isaias Delgado while in the presence of Inspector Villahermosa. Sec'y's Post-Trial Br., at 10. Delgado denied at hearing any actions or statements that would support a finding of violation. Tr. 209, 213. This Court considered this evidence at length *supra* and finds it to be a problematic basis for the citation at issue.[24]

The sixth piece of corroborative evidence is essentially the same "silence is affirmation" argument already advanced by the Secretary and discounted by this Court. Sec'y's Post-Trial Br., at 10.

The seventh piece of evidence is a fact summary that implies an operator's efforts at abatement constitutes proof of a violation. Sec'y's Post-Trial Br., at 10. As noted *supra*, the fact that Frias abated the violation pursuant to the instructions of Inspector Villahermosa could just as easily have been an effort to mollify Villahermosa as it could have been an effort to abate a violation. Moreover, Commission precedent has long held that the method of abatement cannot prove, or disprove, the validity of a citation: "the method of abatement is not determinative of the existence of a violation. *See also Asarco Mining Co.*, 15 FMSHRC 1303, 1309 (July 1993) (method of abatement not before Commission in a contest proceeding); *U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2308 n.6 (Oct. 1984) (judge's discussion of abatement method in resolving merits of S&S finding was error). In short, the manner of abatement is not pertinent to the existence of a violation." *Secretary of Labor v. Western Industrial Inc.*, 25 FMSHRC 449, 453, (Aug. 2003).

The eighth, ninth, tenth, and eleventh pieces of evidence are a collection of what might be termed "missed opportunities," wherein Frias could have challenged the citation's validity during or after its issuance. This summary is surely meant to imply that Frias's silence or inaction is evidence of violation. Sec'y's Post-Trial Br., at 10-11. This is again unpersuasive to the Court.

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[24] This Court acknowledges that an inspector's testimony, standing alone, may constitute sufficient evidence to prove the existence of a safety violation – *if such testimony is found to be reliable – see, inter alia, Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-9 (Dec. 1998) (holding that the opinion of an investigator that a violation is S&S is entitled to substantial weight). However, as discussed herein, Villahermosa's testimony was based upon alleged out-of-court declarations that this Court finds to be unreliable and untrustworthy in nature, and based upon observations by Villahermosa that were credibly and persuasively rebutted by Calixto Frias.

As noted by the Respondent, the Secretary's additional corroborative evidence, taken together, constitutes recapitulation and not corroboration.[25] Resp't's Reply Brief, at 5. This Court declines to draw adverse inferences against the Respondent from evidence presented by the Secretary which is so problematic in nature. This Court finds the Secretary's additional corroborative evidence is not sufficiently probative or reliable so as to constitute substantial evidence.

The evidence and arguments presented by the Secretary are unpersuasive. As such, the Secretary has not carried his burden by the preponderance of the evidence. Therefore, the Court finds that the citation at issue should be vacated.[26]

ORDER

Accordingly, it is hereby **ORDERED** that Citation No. 8723601 is **VACATED**.

John Kent Lewis
Administrative Law Judge

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[25] Technically, this sort of reasoning would fall under the fallacy of "proof by assertion." MARCUS TULLIUS CICERO, *DE NATURA DEORUM* (H. Rackham, trans., Harvard University Press 1933) (45 BCE).

[26] For this reason the Court makes no finding regarding the significant and substantial (S&S) determination made by Inspector Villahermosa, nor the operator's alleged degree of negligence.